

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

CLARA BURKE NURSING HOME, INC. d/b/a  
THE CLARA BURKE COMMUNITY<sup>1</sup>

Employer

and

Case 4–RC–19736

DISTRICT 1199C, NATIONAL UNION  
OF HOSPITAL AND HEALTH CARE  
EMPLOYEES AFSCME, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

5. Clara Burke Nursing Home Inc., d/b/a The Clara Burke Community, herein called the Employer, operates a 61 bed capacity long term nursing care facility located in Plymouth Meeting, Pennsylvania, herein called the Home. The Petitioner seeks to represent a unit of approximately 44 full-time and regular part-time Registered Nurses (RNs), Charge Registered Nurses and Licensed Practical Nurses (LPNs). The Employer employs approximately 22 RNs. The Employer contends that RNs Laura McElroy, Louise Bolt, Amy Saldutti, Christina Witt, Michael Thistle, Anne Cutillo and Julie McClung are supervisors within the meaning of Section 2(11) of the Act.<sup>2</sup> The Petitioner currently represents the Employer's service employees, including Certified Nursing Assistants (CNAs), dietary and housekeeping employees.<sup>3</sup>

The Home consists of three nursing units. Two units are subacute units each consisting of twenty beds. These units provide care for high acuity, ventilator, wound care, and respiratory management patients. The third unit is a long-term skilled unit, which has twenty-one beds. The facility is the permanent residence for about half of the residents in the long-term unit. There are currently about 54 residents or patients in the facility. The facility operates 24 hours per day, 7 days a week. There are two twelve-hour shifts starting at 7 a.m. and 7 p.m. each day.

The Home has the following departments: nursing, dietary, housekeeping, social services, maintenance, activities and administration. Paul Goldenberg is the Home's Administrator. Suzanne Arrighy, the Director of Nursing (DON), is responsible for the nursing department, including overseeing its clinical and financial aspects. Arrighy normally works during the first shift from about 8 or 8:30 a.m. until about 5:30 or 6:00 p.m. and about 4 hours a day every eighth or ninth weekend. Clinical Care Coordinator Sheron Lindstrom and Registered Nurse Assessment Coordinator Sherry Auken report directly to Arrighy. The Employer employs four RN Supervisor Charge Nurses on the first shift and three RN supervisors on the second shift who also report to Arrighy. RNs, LPNs and CNAs are employed in the nursing department.

LPNs are responsible for overseeing the care of specified patients to which they are assigned. Their oversight includes providing medication (intravenously and orally), wound care, and respiratory care, as needed. RNs perform the same duties as the LPNs, except for additional patient care tasks such as TPNs (a procedure used for feeding patients), IV pushes or drawing blood from IV lines.

In October 1998, the Department of Health and Human Services for the Commonwealth of Pennsylvania concluded that Employer's operations were deficient as the Employer failed to designate a full time RN as the charge nurse during certain periods of the day. In response to the Commonwealth's findings, the Employer created a new RN supervisor position to provide 24 hour a day on site responsibility for the Employer's operations. The Employer conducted in service training during which the duties of the RN supervisor position was discussed. RN supervisors' patient loads were to be reduced and they were to do "rounding" and take call-outs, and handle clinical and operational problems that occurred at the facility when the DON was not

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<sup>2</sup> McElroy, Bolt, Saldutti and Witt also serve as RN Supervisor Charge Nurses.

<sup>3</sup> The record does not contain a copy of the collective bargaining agreement covering the service employees.

present. RNs were selected for RN supervisor positions after they completed an application and interview process. According to the RN supervisors, patient loads have not decreased and their job duties have not otherwise changed. In January or February 1999, because of accountability and follow-through for clinical issues, the Employer established another new position, RN Supervisor Charge Nurse.<sup>4</sup>

The record is unclear as to whether the RN supervisor who has been designated on the daily time sheet as “supervisor” receives an additional fifty cents an hour or whether all of the three individuals who have been selected as RN supervisors receives the wage differential. Similarly, while RN Supervisor Charge Nurses receive an across the board salary increase based on their individual experience levels, the record is unclear whether the across the board increase becomes a part of their base pay or whether they only receive the wage increase when they are designated “supervisor” on the daily time sheets.

The job description for RN supervisor provides, *inter alia*, that the RN supervisor serves as the designated nurse in charge of the facility in the absence of the DON, a resource person for other departments within the established guidelines of the facility in the absence of their administrative personnel, and a consultant to other nursing personnel in making clinical and administrative decisions. In addition, the job description provides that the RN supervisor monitors the quality of nursing care of all patients or residents by working through and with the “Unit Charge Nurse” and evaluates the performance of “licensed nurses that report directly to the nursing supervisor.” The RN supervisor job description also provides that RN supervisors must assure adequate staffing in the nursing units.

The record shows that the DON fills out evaluation forms for all staff, including RNs. Although the RN supervisors speak to the DON about problems as they occur, the DON does not formally seek their input when preparing the forms. With respect to discipline, the RN supervisors have reported incidents to the DON and have suggested that she speak to the employee in question about the incident. However, the RN supervisors have never disciplined any employees.

According to DON Arrighy, RN supervisors do not make initial staffing decision. They do not assign employees to their shifts nor do they prepare the master schedule. However, if someone calls in sick, the RN supervisor may take the call and record the appropriate notation on a call out slip. The RN supervisors have signed the call out slips in the area on the form designated for “supervisor.” The RN supervisors have the authority to reassign staff based on the needs of the patients and may request, but not require, unscheduled employees to fill in for an absent employee. Nurses, other than RN supervisors, have requested off duty employees to come in during times of understaffing. The DON approves all overtime.

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996) *enfd.* 121 F.3d 548, 156 LRRM 2001 (9<sup>th</sup> Cir. 1997); *The Door*, 297

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<sup>4</sup> First shift RN supervisors McElroy, Bolt, Saldutti and Witt are the RN Supervisor Charge Nurses. They work on the first shift.

NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Hospital*, supra, 320 NLRB at 725; *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise independent judgment in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 574, 146 LRRM 2321, 2322 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. *Providence Hospital*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. The authority effectively to recommend “generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1995), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5<sup>th</sup> Cir. 1963); *E&L Transport*, 315 NLRB 303 fn. 2 (1994); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enf. 140 LRRM 2120 (6<sup>th</sup> Cir. 1992). Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *Store Employees Local 347 v. NLRB*, 422 F.2d 685, 71 LRRM 2397, 2399–2400 (D.C. Cir. 1969); *NLRB v. Security Guard Service*, 384 F.2d 143, 66 LRRM 2247, 2250 (5<sup>th</sup> Cir. 1967), enf. 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80<sup>th</sup> Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hospital*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992); *NLRB v. Security Guard Service*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Providence Hosp.*, supra, 320 NLRB at 728-29; *New York University*, 221 NLRB 1148, 1156 (1975).

In *NLRB v. Health Care & Retirement Corp.*,<sup>5</sup> the Supreme Court rejected the Board's longstanding position that a nurse's actions taken in the interest of patient care are distinct from those taken in the interest of the nursing home employer, within the meaning of that phrase under Section 2(11). The Court held that in differentiating the interest of patient care from the interest of the employer, the Board had created a false dichotomy because patient care *is* the business of a nursing home. Thus, in the case before it, the Court concluded that in attending to the needs of patients, nursing home LPNs were acting in the interest of the Employer. By that logic, the Court eschewed the Board's position that "a nurse's direction of less skilled employees in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised in the interest of the employer" as inconsistent with the statute and the Court's precedent. *NLRB v. Health Care & Retirement Corp.*, supra, 511 U.S. at 577–580, citing *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). At the same time, the Court underscored that its decision in *Health Care* concerned only the proper interpretation of the statutory phrase, "in the interest of the employer." Accordingly, for the purposes of this case, *Health Care* stands solely for the proposition that the LPN charge nurses' direction of the CNAs is exercised in the interest of the Employer. To prove supervisory status of the RN supervisor nurses, the Employer still must prove first, that RN supervisor nurses possess at least one of Section 2(11)'s indicia of supervisory authority, and second, that the exercise of that authority requires the use of independent judgment. *NLRB v. Health Care & Retirement Corp.*, supra, 511 U.S. at 574. The burden of establishing supervisory status is on the party asserting that such status exists. *St. Francis Medical Center - West*, 323 NLRB 1046-1047 (1997). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hospital*, supra, 320 NLRB at 725. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, supra, 295 NLRB at 490.

There is no contention that the Employer's RN Supervisors or RN Supervisor Charge Nurses have the authority to discharge, lay off, recall, promote or hire employees or to adjust employee grievances. As to the issue of assignment of work, the Employer relies on the fact that the RN supervisors may make daily reassignments. The record establishes that these reassignments are based on patient needs. It is well established that distributing daily assignments to employees whose skills are not significantly varied, or to employees with different skills whose abilities are well known, is generally routine and not supervisory. *Vencor Hospital*, 328 NLRB No. 167, slip op. at 4 (August 5, 1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997); *Altercare of Hartsville*, 321 NLRB 847, 847 (1996), enft. denied 129 F.3d 365, 156 LRRM 2865 (6<sup>th</sup> Cir. 1997); *Parkview Manor*, 321 NLRB 477, 478 (1996); *Providence Hosp.*, supra, 320 NLRB at 727, 731. In view of the limited nature of the reassignment, i.e., based on patient needs, I find that adjusting an assignment in this matter is not indicative of supervisory status. *Vencor Hospital*, supra, 328 NLRB slip op. at 4; *Providence Hosp.*, supra, 320 NLRB at 727.

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<sup>5</sup> Supra, 511 U.S. 571, 146 LRRM 2321.

With respect to the RN supervisors' role in securing replacements when a particular shift is understaffed, the evidence reveals that they may call employees who are not scheduled to work to solicit them to fill in for absent employees. There is no evidence, however, that the RN supervisors have the authority to require any employee to work beyond their regularly scheduled hours. See, *St. Francis Medical Center- West*, 323 NLRB 1046, 1047 (1997). Moreover, nurses who are not working in the capacity of RN supervisors will make the same calls. The Board has consistently held that the ability to transfer or call in employees based on staffing shortages requires routine, not independent judgment. *Northern Montana Health Care Center*, 324 NLRB 752, 754 (1997); *Parkview Manor*, supra, 321 NLRB at 478; *Providence Hospital*, supra, 320 NLRB at 732. Similarly, there is no evidence that RN supervisors use independent judgment in receiving calls from employees who announce that they will not be at work due to illness. *St. Francis Medical Center - West*, 323 NLRB, supra at 1048 (1997).

Although the DON stated that RN supervisors have the authority to discipline employees, there was no evidence that the RN supervisors have ever exercised this authority. The record evidence shows that on one or two occasions an RN supervisor recommended that the DON speak to an employee about a behavioral problem. Thus, the RN supervisors, at most, participate in the Employer's disciplinary procedure in a reportorial capacity. I find that the RN supervisors' involvement in the Employer's disciplinary procedure is an insufficient basis to show supervisory status. *Northcrest Nursing Home*, supra, 313 NLRB at 497.

The Board has found supervisory status where an individual independently completes evaluations of other employees which lead directly to personnel actions such as merit raises, but has declined to find such status when the evaluations themselves do not effect these actions. *Ten Broeck Commons*, supra, 320 NLRB at 813; *Northcrest Nursing Home*, supra, 313 NLRB at 498. The Employer presented no evidence that RN supervisors complete evaluations of any other employees. Although the DON does not formally seek the input of RN supervisors when she prepares employee evaluations, she noted that she receives feedback from RN supervisors about employees with whom they work. Input alone, without exclusive responsibility for preparing the evaluations, however, will not show supervisory status. *Ten Broeck Commons*, supra, 320 NLRB at 813; *Northcrest Nursing Home*, supra, 313 NLRB at 507.

Finally, the Employer presented a job description for the position of RN supervisor. It is well established that such secondary indicia do not bear on the issue of supervisory status in the absence of evidence of actual supervisory authority. *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991).

Based on the foregoing, I find that the Employer has not satisfied its burden of proving that neither the RN supervisors nor the RN Supervisor Charge Nurses possess the indicia of supervisory authority set forth in Section 2(11) of the Act.

As the RNs are professional employees, they may constitute a separate appropriate unit. *Holliswood Hospital*, 312 NLRB 1185 (1994). However, the parties have agreed that a unit consisting of RNs and LPNs would also be appropriate if the RNs voted for inclusion in such a unit. In these circumstances, a self-determination *Sonotone*<sup>6</sup> election is appropriate in this matter.

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<sup>6</sup> *Sonotone Corp.*, 90 NLRB 1236 (1950).



*Dominican Santa Cruz Hospital*, 307 NLRB 506, 508 (1982); *St. John of God Hospital*, 260 NLRB 905, 906 (1982). Accordingly, I find that the following employees constitute voting groups or units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Unit A**

All full time and regular part-time Registered Nurses (RNs), RN supervisors and RN Supervisor Charge Nurses employed by the Employer at its 251 Stenton Avenue, Plymouth Meeting, Pennsylvania facility, excluding all other employees, Directors of Nursing, Clinical Coordinators, Staff Development Coordinators, Registered Nurse Assessment Coordinators, guards and supervisors as defined in the Act.

**Unit B**

All full time and regular part-time Licensed Practical Nurses (LPNs) employed by the Employer at its 251 Stenton Avenue, Plymouth Meeting, Pennsylvania, facility, excluding all other employees, Directors of Nursing, Clinical Care Coordinators, Staff Development Coordinators, Registered Nurse Assessment Coordinators, guards and supervisors as defined in the Act.

The ballot for employees in Unit A will ask the following two questions:

1. Do you wish to be included with the non-professional employees in Unit B in a single unit for purposes of collective bargaining?
2. Do you wish to be represented for the purposes of collective bargaining by District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO?

If a majority of the professional employees in Unit A votes “Yes” to the first question, indicating their desire to be included in a unit with nonprofessional employees, they will be so included, and their votes on the second question will be counted together with the votes of the employees in Unit B to decide the question concerning representation for the overall unit consisting of the employees in Units A and B.

If, on the other hand, a majority of the employees voting in Unit A do not vote “Yes” to the first question, their ballots will be counted separately to decide the question concerning representation in a separate Unit A.

## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently,<sup>7</sup> subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

### **DISTRICT 1199C, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO**

## **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision **3** copies of **separate** election eligibility lists for **UNIT A** and **UNIT B**, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **August 27, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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<sup>7</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.



## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **September 3, 1999**.

Signed August 20, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan  
**DOROTHY L. MOORE-DUNCAN**  
Regional Director, Region Four

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